UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
SHREVEPORT DIVISION

CRYSTAL OIL COMPANY, AND CRYSTAL EXPLORATION AND PRODUCTION COMPANY,	§	Civil Action No. CV 95-2115S
Plaintiffs	§	JUDGE TOM STAGG
v.	§	MAGISTRATE JUDGE PAYNE
ATLANTIC RICHFIELD COMPANY,	§	
Defendant	§	

PLAINTIFFS' SUPPLEMENTAL MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION TO TRANSFER VENUE

Plaintiffs Crystal Oil Corporation ("Crystal") and Crystal Exploration and Production Company ("CEPCO") file this supplemental reply memorandum in opposition to defendant Atlantic Richfield Company's ("ARCO") motion to transfer venue.

INTRODUCTION

This Court is the only proper one to determine the first issue in this case: whether ARCO has violated and is violating the 1986 discharge injunction by asserting the Environmental Claim.[1] ARCO has elected to assert the Environmental Claim, with full knowledge of the 1986 discharge and the resulting discharge injunction, without first seeking approval of this Court or of any other court. Before 1986, ARCO unquestionably contemplated the Environmental Claim; documents already available, before any discovery response in this case, preclude any plausible denial. ARCO's actions are contemptuous of this Court's § 524 discharge injunction, and this Court should hold ARCO accountable.

[1]Terms defined in plaintiffs' original Memorandum (filed April 8, 1996) will be used with the same meaning in this Supplemental Memorandum.

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ARCO recognizes, as it must, that the Complaint presents two straightforward issues: (1) whether ARCO has violated the discharge injunction, and (2) whether ARCO's claim is barred by contract. Yet, it argues that this case is of immense complexity and will involve innumerable witnesses, documents, and issues--all of which are rooted in Colorado or Colorado law. ARCO's expansive approach to this case, however, is not based on the issues presented. This case does not require scorched earth discovery[2] or detailed reconstruction of decades of history. The focused issues presented by the Complaint, which plaintiffs believe will be dispositive of this case, can and should be decided by this Court, which is convenient both to the parties and to witnesses.

I. THIS COURT SHOULD DECIDE WHETHER ARCO'S CLAIM VIOLATES THE DISCHARGE INJUNCTION

ARCO's Reply ignores what the Complaint in this case charges ARCO with—violating the Bankruptcy Code § 524 injunction by attempting to collect the Environmental Claim from Crystal. In plaintiffs' original Memorandum, Crystal correctly stated (1) that the ultimate issue of relief from (or enforcement of) a bankruptcy stay must be heard by the Court which issued it, and (2) that even though there may be concurrent jurisdiction to decide the necessary threshold issue to a § 524 violation (*i.e.*, whether the claim being asserted actually was discharged), the threshold issue and the ultimate issue of whether the assertion of a claim has violated the § 524 discharge injunction should be heard by the Court which issued the injunction.

In *Celotex Corp. v. Edwards*, 115 S.Ct. 1493, 1501 (1995) the Supreme Court held that a claim that a party has violated a bankruptcy court injunction must be heard by the court that issued it and that "persons subject to an injunctive order issued by a

[2]Plaintiffs' requests for documents have been reasonably tailored to the issues presented in the Complaint. ARCO's suggestion to the contrary is simply in error.

court with jurisdiction are expected to obey that decree until it is modified or reversed." The Supreme Court went on to describe what ARCO should have done here, if it wanted relief from the § 524 discharge injunction—ARCO should have come to the court which issued the injunction and obtained that relief before it violated the injunction by asserting a discharged claim against Crystal. *Id.*

Contrary to the Supreme Court's holding in *Celotex*, ARCO argues that "all federal and state courts have concurrent jurisdiction over actions such as this." ARCO Reply at 2 (emphasis added). In essence ARCO argues it could have gone to another court to have that court exercise its concurrent jurisdiction to decide "this" case. ARCO's Reply wrongly suggests that "this" case is merely one about the threshold issue of whether the Environmental Claim was discharged by the Plan Confirmation Order in Crystal's 1986 Bankruptcy Case. Instead, "this" case involves Crystal's assertion that ARCO violated the discharge injunction of § 524.

None of the cases ARCO cites deals with an action like "this." In *In Re Brady, Texas, Mun. Gas Corp.*, 936 F.2d at 212, 218 (5th Cir. 1991), the court gave res judicata effect to a state court judgment in a case brought by a party seeking to determine damages from the rejection of its contract in bankruptcy. When that party disliked the result it got in state court and came back to try to litigate the same rejection damage claim in bankruptcy court, the Fifth Circuit held that the state court had concurrent jurisdiction to hear the claim the party had presented to it, and therefore the state court judgment was res judicata. *Id.* *Brady Gas* is thus not "this" case.

In re Siragusa, 27 F.3d 406, 408 (9th Cir. 1994), also cited by ARCO in its Reply, found that the state court had jurisdiction to modify alimony precisely because the case there did not constitute a § 524 violation. The finding that there was no § 524

violation was the cornerstone of the court's decision in *Siragusa*. *Id*. *Siragusa* is thus not "this" case.

ARCO also cites *In re Moralez*, 128 B.R. 526, 527 (Bankr. E.D. Mich. 1991), a case where the moving party did what ARCO should have done here—move before the bankruptcy court to lift the applicable stay. There "the debtor's former spouse . . . filed a motion to lift the stay so that she [could] file a non-dischargeability action against the debtor under 11 U.S.C. § 523(a)(5) in state court." *Id*. The bankruptcy court lifted the stay finding that a state divorce court could better decide the combination bankruptcy/divorce law issues presented in that particular case. *Id*. at 528. *Moralez* is thus not "this" case.

There is a reason that "this" case is pending here in the judicial district where the Confirmation Order brought the § 524 discharge injunction into existence, and is not pending, for example, before a federal district court in Colorado. ARCO, which prefers that forum, did not want to obtain a ruling on discharge before it started asserting its claim. Crystal has come where the Supreme Court has said it should come to obtain that ruling.

In addition to *Celotex*, Crystal places reliance on *In re Texaco, Inc.*, 182 B.R. 937, 947-48 (Bankr. S.D.N.Y. 1995), where the court's entire analysis presumes that there are other courts which could decide some of the issues presented, but holds that the bankruptcy court which issued the confirmation order is the best one to decide the issue of whether a discharge injunction has been violated. As described in plaintiffs' original Memorandum, the *Texaco* court considered whether it should abstain from "interpreting and apply[ing] its own confirmation order" in favor of a prior pending state court action which had jurisdiction over the underlying claims, and held that the court whose order was allegedly being contemptuously violated "should" make those threshold

determinations. *Id.* at 947. Moreover, the *Texaco* court found strong reason for the court to exercise its discretion not to abstain and to keep and decide this threshold issue because what was ultimately presented was an issue of contempt of a § 524 discharge injunction which is an "affront" to the court whose order is being violated. *Id.* These reasons also provided the basis for *Texaco* to exercise its discretion to retain venue, not just to decide the ultimate issue of contempt, but also to decide the threshold issues of "interpret[ing] and enforce[ing] its own orders." *Id.* at 948.

ARCO also suggests, incorrectly, that it is free to assert a discharged claim all it wants until Crystal proves that the claim was discharged. ARCO Reply at 5. The bankruptcy system deals frequently with this issue. Section 362 creates an automatic stay during a bankruptcy case against prosecution of pre-petition claims and § 524 creates an automatic stay post-plan confirmation against prosecution of claims which have been discharged. In both places, parties should obtain a lifting of the stay before pursuing a claim, or they act at their peril. If they pursue a claim that is subject to one of these automatic stays they can be held in contempt. *See, e.g., Texaco*, 182 B.R. at 947-48; *Kearns v. Orr*, 168 B.R. 423, 425 (D. Kan. 1994); *Kearns v. Orr*, 161 B.R. 701, 704 (D. Kan. 1993); *In re Tardo*, 145 B.R. 862, 865 (E.D. La. 1992). Indeed, in *Pace v. Taxel*, 159 B.R. 890, 901 (9th Cir. 1993), the Ninth Circuit's Bankruptcy Appellate Panel held that:

> a party's violation of the stay may be willful even if he believed himself justified in taking an action found to be violative of the automatic stay. . . . "Not even a 'good faith' mistake of law or a 'legitimate dispute' as to legal rights relieve a willful violator of the consequences of the act." . . . A party takes a calculated risk when it undertakes to make its own determination of what the stay means. . . . Where "the automatic stay is concerned, it is far better to be a 'timid soul' who seeks a court determination of the limits of the stay, rather than to fail 'while daring greatly.'"

(Citations omitted). These principles also apply to the discharge injunction of § 524. *See, e.g., In re Batla*, 12 B.R. 397, 399 (Bankr. N.D. Ga. 1981).

ARCO argues that there are no facts before this Court that show that "ARCO had any knowledge in 1986 about a potential CERCLA claim against Crystal Oil relating to the Rico Site." ARCO Reply at 5. Plaintiffs respectfully submit this statement is incorrect. It is undisputed that contamination exists at the Rico site. It is undisputed that the contamination occurred before 1986. Further, it is demonstrable and not subject to reasonable dispute that ARCO knew of the contamination and therefore necessarily knew of the Environmental Claim long before October 31, 1986.

The current cleanup plan, proposed by ARCO in 1995, is designed to prevent surface water runoff of pollutants from the mining tailings through techniques to (1) cover the contaminants and with rocks, (2) stabilize the slopes, and (3) prevent drainage. *See* excerpts from November 1995 Voluntary Cleanup Plan Application for the Argentine Tailings Site at 4-1 through 4-29, Appendix, Tab A.

ARCO started these same control measures in the early 1980s. The State of Colorado's Department of Natural Resources approached Anaconda in July of 1980 about investigating the Rico site to determine the "types and extent of problems" associated with prior mine activities. *See* July 9, 1980 letter from Colorado Inactive Mine Reclamation Program to Robert Newell of Anaconda, Appendix, Tab B. Several months later, Anaconda (then ARCO's subsidiary) commissioned a study to look at ways to control surface water runoff to prevent contaminants from flowing into local surface waters. *See* September 16, 1980 letter from Douglas V. Johnson, attorney for Anaconda, to Davis O'Connor, Appendix, Tab C. In 1982, apparently as a result of these investigations, ARCO, by its own admission, initiated "slope stabilization work at the tailings ponds" and built up materials around the tailings to further prevent

contaminants from draining into local surface waters. *See* November 1995 Voluntary Cleanup Plan Application excerpts at 2-3, Appendix, Tab E to plaintiffs' original Memorandum.

In 1985, the EPA began its first step in investigating the site to determine if it should be listed as a federal Superfund site under CERCLA by sending a contractor to conduct an environmental investigation of the site. *See* CH_2M Hill Ecology & Environment Report, dated July 29, 1985, Appendix, Tab F to plaintiffs' original Memorandum. The environmental contractor verified the presence of CERCLA hazardous substances on the site, including lead compounds, manganese compounds, and zinc compounds. *Id.* at Table 1 - Table 5; 42 U.S.C. § 9601(14) (1994). In 1986, Anaconda also initiated a "hazardous substances elimination program" in the mill area for the disposal and recycling of hazardous substances. *See* November 1995 Voluntary Cleanup Plan Application excerpts at 2-3, Appendix, Tab E to plaintiffs' original Memorandum. The foregoing demonstrates conclusively that ARCO had knowledge of the Environmental Claim long before October of 1986. The cleanup activities that ARCO is voluntarily conducting today are the same as those that ARCO started in the early 1980s.

Finally, ARCO remarkably suggests that this Court is not better situated to decide the bankruptcy discharge and § 524 violation issues because, in essence, it does not know anything more than the Colorado district court about Crystal's bankruptcy case and the Confirmation Order. ARCO Reply at 4. This Court's bankruptcy unit heard Crystal's bankruptcy case and entered the Confirmation Order and this Court can take advantage of that experience in any number of ways, including reference of some or all of this case to Bankruptcy Judge Calloway for either findings or an order. 28 U.S.C. § 157 (1994). On April 19, 1996, Crystal filed a motion in its bankruptcy case

seeking a finding that another creditor has violated the § 524 discharge injunction by asserting two other environmental cleanup claims against Crystal, that it too knew about in 1986. *See* Crystal's Memorandum in Support of Motion to Enforce Confirmation Order and Bar Date Order, Appendix, Tab D. A consistent approach should be followed with respect to the discharge issues presented in these three cases, and this Court and its bankruptcy unit are best situated to do that.

II. UNDER 28 U.S.C. § 1404(a) THIS CASE SHOULD PROCEED IN LOUISIANA

ARCO acknowledges in its Reply that "deference" is paid to plaintiffs' forum choice in a traditional 28 U.S.C. § 1404(a) analysis and only complains that plaintiffs have overstated the amount of deference afforded. *See* ARCO Reply at 6. In the Fifth Circuit, a plaintiff's forum choice is "highly esteemed" and accorded substantial weight, especially when, as here, the plaintiff brings its cause of action in its home forum, and the cause of action has a significant connection to that forum. *See* plaintiffs' original Memorandum at 14.

ARCO again fails to identify a single "key" witness for purposes of weighing the convenience of witnesses under § 1404(a). Instead it lists "possible" witnesses. Its identification of 53 "possible" but "by no means" exhaustive witnesses, suggests an unwarranted scorched earth approach to discovery and trial, especially when one considers ARCO will presumably try to prove what it did not know at the time of bankruptcy discharge. ARCO's listing describes only topics, not anticipated testimony, and fails to give any consideration to duplicative testimony. Some of ARCO's identified "possible" witnesses reside outside of Colorado or are employees of ARCO (*e.g.*, Douglas V. Johnson, ARCO's employee residing in Alaska), and thus lend no support to ARCO's request for transfer. As a whole, the "possible witnesses" list should be accorded little or no weight in the transfer analysis. ARCO's general assertion that "reams" of

documentary evidence reside in Colorado is equally insubstantial, in light of the fact that all of Crystal and CEPCO's documents are in Shreveport, and in light of the fact that location of documents is afforded very little weight in a § 1404(a) analysis. *See* plaintiffs' original Memorandum at 17-18.

ARCO also argues that this court is not a suitable court to interpret the contractual allocation of CERCLA liability in the Closing Agreement, alleging that Colorado law will govern the supposedly "unsettled" contract issues presented. ARCO Reply at 8. However, federal law, not Colorado law, will govern the parties' contractual allocation of CERCLA liability because "federal law always governs the validity of releases of federal causes of action." *Mardan Corp. v. C.G.C. Music, Ltd.*, 804 F.2d 1454, 1457-58 (9th Cir. 1986); *Ingram Corp. v. J. Ray McDermott & Co.*, 698 F.2d 1295, 1316-17, 1323 (5th Cir. 1983).[3] Moreover, it should make little, if any, difference whether state law plays any role because the analysis under state and federal law is "essentially identical" when determining contractual allocation of CERCLA liability. *North Star Co. v. Archer Daniels Midland Co.*, 1993 U.S. Dist. LEXIS 10253*6 (D. Minn. July 16, 1993). The issue of whether pre-CERCLA contracts can allocate CERCLA liability is hardly unsettled. "[C]ourts that have analyzed pre-CERCLA indemnity provisions have uniformly held that a pre-CERCLA agreement can require one party to indemnify another against CERCLA liability." *Beazer East, Inc. v. Mead Corp.*, 34 F.3d 206, 211 (3rd Cir. 1994), *cert. denied*, 115 S. Ct. 1696 (1995).

Furthermore, contrary to ARCO's assertion, this lawsuit does not "involve the application of Colorado's new voluntary cleanup law [VCP]." ARCO Reply at 9. The

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[3]Although some courts applying federal law to a release of alleged CERCLA causes of action have looked to state law to provide the content of federal law, *Olin Corp. v. Consolidated Aluminum Corp.*, 5 F.3d 10, 12 (2nd Cir. 1993), these courts have not adopted every state rule, but instead "reject specific state rules that are aberrant or hostile to federal interests." *Mardan*, 804 F.2d at 1458. Defendants have identified no basis for suspecting that Colorado courts would adopt an abnormal rule.

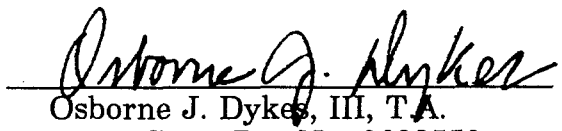
legal issues associated with whether (1) ARCO complies with the Colorado VCP and (2) ARCO complies with CERCLA national contingency plan requirements are entirely distinct, and only legal issues associated with the latter could possibly be relevant to this lawsuit. A determination that ARCO has or has not complied with the Colorado VCP has no bearing on whether ARCO has complied with CERCLA's national contingency plan.

Finally, ARCO continues to suggest that if this Court does not rule as ARCO desires, it will be "forced" to file another action adding parties and issues by the score, causing inefficiency and confusion. On the contrary, nothing in plaintiffs' suit forces ARCO to file any third-party action or separate action. The issues raised by the Complaint are between plaintiffs and ARCO and are the threshold issues which must be decided first. This Court is the best court to decide the issues in this case.

CONCLUSION

Because this Court is the only proper one to determine whether its discharge injunction has been violated and because ARCO has failed to meet its heavy burden to show why the case should not proceed in this forum, Crystal and CEPCO pray that this Court deny ARCO's motion.

FULBRIGHT & JAWORSKI L.L.P.



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that in compliance with the Federal Rules of Civil Procedure, on this 26th day of April, 1996, a copy of the above and foregoing has been served on counsel for Defendant, Atlantic Richfield Company, by placing a copy of same in the United States mail, properly addressed and with adequate postage affixed thereon to:

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APPENDIX

TAB

A November 1995 Voluntary Cleanup Plan Application for the Argentine Tailings Site

B July 9, 1980 letter from Colorado Inactive Mine Reclamation Program to Robert Newell of Anaconda

C September 16, 1980 letter from Douglas V. Johnson, attorney for Anaconda, to Davis O'Connor

D Crystal Oil Company's Memorandum in Support of Motion to Enforce Confirmation Order and Bar Date Order